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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of Competitive Telecommunications Association, et al On Defining Certain Incumbent LEC Affiliates As Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act	))))	CC Docket 98-39

COMMENTS OF ICG TELECOM GROUP

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SUMMARY

The CompTel Petition raises, from a different perspective, the same basic issue that the Commission has been asked to weigh in various proceedings by the entire telecommunications industry: the extent to which ILECs will be held to their local competition obligations under Sections 251 and 252 of the Communications Act as a prerequisite to reaping the lucrative benefits the Act can potentially provide.

The primary concern expressed by the CompTel Petition and amplified by ICG in these comments is that the ILECs are attempting to use the Section 251 sword, which was enacted to open up the local service monopoly to new competitors, as a shield to evade their statutory obligations. Rather than taking the necessary steps to open up the local service monopoly, the ILECs seek to maintain their dominance through a shuffling of corporate entities. Under this scenario, the ILECs will simply transfer certain services to "competitive" affiliates, which ICG labels herein as "ILEC CLECs" to underscore their mutually beneficial relationship with the ILEC, that themselves interconnect with the ILEC network, as a way of avoiding any obligations under the Act that would otherwise attach to the ILEC. The ILEC CLEC strategy works hand in hand with the ILECs' use of other proceedings to shift the debate away from increasing local competition and toward improving the financial bottom lines of the incumbent carriers.

The Commission should grant the relief sought by the CompTel Petition without delay. The ILEC's use of ILEC CLECs to evade their Section 251 obligations is endangering the promise of the Act to bring about local competition. In addition, both

ILECs and their competitors, the CLECs, need regulatory certainty on the issues set forth in the CompTel Petition to move forward in bringing competition to the local telecommunications marketplace. To the extent that complex issues arise that require a more in-depth analysis, the Commission can initiate a rulemaking proceeding after immediately granting declaratory relief. Such a rulemaking proceeding, however, should neither delay the relief sought by the CompTel Petition nor be a substitute for it.

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COMMENTS OF ICG TELECOM GROUP

Pursuant to the Commission's Public Notice, DA 98-627, released April 1, 1998, ICG Telecom Group ("ICG"), hereby respectfully submits its comments regarding the Petition for Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers Under Section 251(h) of the Communications Act of 1934, as amended ("the Act"), filed by the Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association ("CompTel Petition"). The CompTel Petition concerns the creation of competitive local exchange carrier ("CLEC") affiliates by incumbent local exchange carriers ("ILECs") to evade certain obligations for ILECs set forth in Sections 251 and 252 of the Act.

ICG, the largest "facilities-based" competitive local exchange carrier ("CLEC") that is not affiliated with a major interexchange carrier ("IXC"), has an interest in this proceeding. ICG is a leading national CLEC with extensive fiber-optic networks. ICG offers local, long distance and enhanced telephony and data services in the states of

California and Colorado, as well as the Ohio Valley and parts of the Southeastern United States.

ICG notes at the outset that the CompTel Petition raises, from a different perspective, the same basic issue that the Commission has been asked to weigh in various proceedings by the entire telecommunications industry: the extent to which ILECs will be held to their local competition obligations under Sections 251 and 252 of the Communications Act as a prerequisite to reaping the lucrative benefits the Act can potentially provide.

For example, last month ICG filed comments in response to a petition by LCI International Telcom Corp. ("LCI") regarding a "fast track" plan to expedite residential local competition and Section 271 entry by encouraging the Regional Bell Operating Companies ("RBOCs") to establish voluntarily separate and independent wholesale and retail service companies.[1] While ICG raised some concerns regarding the completeness of the LCI plan, ICG applauded LCI for its creative proposal to accelerate local competition, not by slowing down the Section 271 process, but instead by holding out the prospect of speeding up the Section 271 process. ICG has stated repeatedly before the Commission that the Section 271 "carrot" is one of the few effective levers available for the Commission's use in prying open the local monopoly. It is critical to ensure that the lever be used effectively as possible consistent with statutory requirements. Accordingly, ICG

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[1] Petition of LCI International Telecom Corp. for Expedited Declaratory Rulings, CC Docket No. 98-5, filed January 22, 1998 ("LCI Petition")

suggested that efforts to expedite the Section 271 process must be fully explored in a rulemaking to ensure full compliance with the statutory mandate.

Similarly, also last month, ICG submitted comments in response to petitions by US West Communications, Inc. ("US West") and Ameritech Corporation ("Ameritech") that the Commission "forbear" from imposing a number of regulatory restrictions, including Section 271, to encourage widespread deployment of advanced telecommunications capability.[2] ICG argued that the petitions amounted to another stance in the RBOC's full court press against having to comply with the local competition requirements of Section 251. ICG maintained that the Act gave each RBOC its own in-region "homework" assignment with respect to interconnection, unbundling, and resale. Only those RBOCs that complete their homework assignments correctly are eligible to graduate to providing in-region interLATA service. Sadly, ICG noted the two RBOCs in question had not come close to completing their local competition assignments. Instead, the two RBOCs have used their petitions as a way of shifting their focus – and that of the Commission – away from the RBOCs' local competition obligations, set forth in Section 251, to issues that allow the RBOCs to maximize profits at the expense of their would-be competitors and their potential customers.

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[2] Petition of US West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services, CC Docket No. 98-26, filed February 25, 1998; Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability, CC Docket No. 98-32, filed March 5, 1998.

The Commission is again confronted with the necessity of addressing concerns about the conduct of the ILECs and the lack of progress in local competition that have been expressed in other proceedings. This time, however, these concerns apply from a perspective different than Section 271 provision of interLATA service.

The primary concern expressed by the CompTel Petition and amplified by ICG in these comments is that the ILECs are attempting to use the Section 251 sword, which was enacted to open up the local service monopoly to new competitors, as a shield to evade their statutory obligations. Rather than taking the necessary steps to open up the local service monopoly, the ILECs seek to maintain their dominance through a shuffling of corporate entities. Under this scenario, the ILECs will simply transfer certain services to "competitive" affiliates, which ICG labels herein as "ILEC CLECs" to underscore their mutually beneficial relationship with the ILEC, that themselves interconnect with the ILEC network, as a way of avoiding any obligations under the Act that would otherwise attach to the ILEC. The ILEC CLEC strategy works hand in hand with the ILECs' use of other proceedings to shift the debate away from increasing local competition and toward improving the financial bottom lines of the incumbent carriers.

The growth of CLECs in local communities across the United States has been the engine of increased local competition. But this growth has not occurred with the help of the ILECs, but largely despite them. In its efforts to serve existing customers and win new customers, ICG has met with procedural foot dragging and operational shortcomings from the ILECs, which have persisted despite ILEC pledges of "cooperation," "harmony,"

and "working together."[3] Although ICG's business plan is premised on the ultimate triumph of competition, this triumph will not come about any time soon unless the Commission keeps a vigilant eye on local telecommunications marketplace and refuses to have its attention diverted by the ILECs and their latest schemes to duck the requirements of Section 251.

The BOCs, in particular, need full compliance with Section 251 before they will be permitted to offer interLATA service under Section 271. The BOCs' ILEC CLEC strategy to evade the command of Section 251 must not be countenanced by the Commission. Instead, the Commission should declare that persisting in this conduct will preclude, among other things, the approval for the provision of service under Section 271.

ICG agrees with the CompTel Petition that an ILEC CLEC operating *outside* of the ILEC's service territory does not raise the anticompetitive concerns with which ICG is concerned. Entry by an ILEC CLEC into another ILEC's territory is the type of competition that the Act encourages. Therefore, ICG's concerns are limited to ILEC CLECs operating in the same ILEC's territory. As the testimony attached to the CompTel Petition makes clear, an ILEC CLEC tends not to seek entry into a *new* market, but rather seeks *reentry* into its *own* markets through a *second* distribution channel with lower regulatory obligations.[4]

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3 *See* Comments filed by ICG Telecom Group in Docket Nos. 98-26 and 98-32.

4 Testimony of Joseph Gilan before the Florida Public Service Commission at 7.

The Commission should grant the relief sought by the CompTel petition without delay. The ILEC's use of ILEC CLECs to evade their Section 251 obligations is endangering the promise of the Act to bring about local competition. In addition, both ILECs and their competitors, the CLECs, need regulatory certainty on the issues set forth in the CompTel petition to move forward in bringing competition to the local telecommunications marketplace. To the extent that complex issues arise that require a more in-depth analysis, the Commission can initiate a rulemaking proceeding after immediately granting declaratory relief. Such a rulemaking proceeding, however, should neither delay the relief sought by the CompTel petition nor be a substitute for it.

I. THE IMPLICATIONS FOR LOCAL COMPETITION MUST BE ADDRESSED

The CompTel Petition highlights for the Commission the latest episode in the continuing saga of the ILECs demonstrating more interest in leveraging their positions as the long-standing monopoly providers of local service than in opening their networks to competing carriers and would-be competitors. Because Sections 251 and 252 are the law of the land whose command cannot be avoided, the ILECs have conceived of ways of minimizing to the greatest extent possible their obligations under those statutory provisions and concentrating their efforts and attention on expanding their respective turfs. The CompTel Petition details how ILECs, particularly BellSouth, are using Section 251 as an opportunity to create ILEC CLECs to lock-up the ILEC's existing customers and to pursue new customers without being constrained by Section 251 obligations.

There are a number of significant problems with ILEC CLECs that, in particular, need to be addressed by the Commission. First, the average consumer of telecommunications services, whether residential or corporate, likely has little reason to distinguish between the ILEC and the ILEC CLEC. This is because what an ILEC CLEC gets from the ILEC in this scenario is likely to be almost everything that matters, including the ILEC's brand name and corresponding goodwill, generous financing and human capital. For example, BellSouth's ILEC CLEC, which is known as BellSouth BSE, can reasonably be expected to receive virtually all of the benefits associated with the reputation and stature of the BellSouth ILEC. BellSouth has even indicated that BellSouth BSE will make use of BellSouth's trademark depicting a bell. Through resale arrangements, the CLEC affiliate can provide local service in the same geographic area as the ILEC over the same facilities as the ILEC. Therefore, a consumer that wants service from "BellSouth" may have little reason to care if it is provided by the ILEC or the ILEC CLEC.

Second, investors also have little reason to differentiate between an ILEC and its ILEC CLEC. For example, again in the case of BellSouth, both BellSouth the ILEC and BellSouth BSE the ILEC CLEC are offspring of the same corporate holding company that is, in turn, to beholden to the same BellSouth shareholders. BellSouth's investors and corporate brass have little reason to care whether the profits are produced by one entity or the other, as long as the bottom line result is attractive. Therefore, BellSouth does not even bother to claim that there is an arm's length independence between the two entities.

Third, as Joseph Gilan makes clear in the testimony attached to the CompTel Petition, the ILEC and the ILEC CLEC are not true competitors because they do not have adverse interests.[5] In Mr. Gilan's words, BellSouth BSE is a "sham entrant" that seeks to "compete against itself" — the BellSouth ILEC.[6] There is no economic distinction, nor can there be, between the ILEC and the CLEC, even if a superficial legal distinction applies.[7] Thus, the ILEC parent is indifferent as to which of its entities carries its profitable business. Obviously, true competitors cannot be indifferent to which one makes a sale – this is the very essence of competition.

The lack of independence between the ILEC and its ILEC CLEC has an even more significant impact on the competitive landscape when one considers expenditures that end up benefiting both entities. For example, any advertising expenditures promoting BellSouth also benefits the BellSouth BSE affiliate. Similarly, the resources the ILEC

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[5] Testimony of Joseph Gilan before the Florida Public Service Commission at 2-4.

[6] Id. at 4. Mr. Gilan describes at length in his testimony this lack of an economic distinction:

> Any price paid by BellSouth-BSE to [the Bell South ILEC] would be no more than a transfer from one BellSouth pocket to another. By contrast, the prices that entrants pay [the Bell South ILEC] are a real economic cost they incur. Similarly, any shifts of customers from [the Bell South ILEC] to BellSouth-BSE would be all in the family. On the other hand, if a bona fide new entrant loses a customer to [the Bell South ILEC], a real market loss occurs. Only BellSouth-BSE can view [the Bell South ILEC] as a partner and not a competitor.

Id. at 13.

[7] Id. at 5.

spends on developing relationships and contacts within the community will likely work in favor of the ILEC CLEC at some point.

An ILEC CLEC also has the ability to introduce targeted, customer-specific contract service arrangements ("CSAs"), as well as reprice existing services, without any obligation to offer these services at a wholesale discount price to its competitors. Obviously, if the same services were offered by the ILEC, they would be provided at tariffed retails rate from which potential competitors could obtain a discount. The incentive for the ILEC, therefore, would be to introduce new services through its ILEC CLEC, because potential resale competitors would only be able to obtain them at the retail rate, which would preclude even the most miniscule profit margin.

In addition, the ILEC CLEC can buy existing CSAs from the ILEC to preclude competition for the ILECs most lucrative customers, many of whom receive service under a CSA. Such a practice preserves the ILECs control over a significant portion of its embedded customer base through a relatively easy, cost-free transfer on the books to a related corporate entity (the ILEC CLEC).[8] As a result, the ILECs' competitors are left without an ability even to *compete* for these customers — the biggest catches of the local service pond.

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[8] Some ILECs have been imposing an anticompetitive CSA "termination" charges before transferring CSAs to non-affiliated CLECs. It is unlikely that the ILEC would impute such a charge to the ILEC CLEC, but even if it did, the "termination" charge simply amounts to a transfer of revenue from one corporate entity to another.

In short, the ILEC CLEC is able to carry with it many assets of value from the ILEC and, in effect, establish itself as a profitable alter ego free of Section 251 obligations. The presence of this ILEC CLEC will not lead to true local competition, but is instead an extension of a brand name from one entity (the ILEC) to another (the ILEC CLEC). In addition, rather than being just another CLEC on the block, the new ILEC CLEC will, upon creation, dwarf any of its independent CLEC competitors through the ILEC CLEC's scale of available resources and expected revenue.

Finally, after the ILEC CLEC inherits the ILEC's valuable assets, what gets left behind with the ILEC is, from the ILEC's point of view, the burden of complying with Section 251 interconnection, unbundling, and resale obligations. Obviously, once the ILEC CLEC absorbs much of the ILEC's human talent and business acumen as well as its financial resources and brand name goodwill, the profitable customer accounts will follow. As made clear above, the ILEC's incentive will be, almost always, to shift everything to the ILEC CLEC, leaving the ILEC a shell of its former self. As such, the ILEC is left to service belatedly and bureaucratically competitors' requests for interconnection, resale, and unbundled elements.

This result does not particularly trouble the ILEC, however. The ILEC entity, stripped of its talent and know-how, is thereby blunted as a competitive force in a field increasingly dominated by the ILEC CLEC. As long as the ILEC CLEC's requests for service are fulfilled at least as quickly as those of its competitors, the ILEC CLEC is content

to let its ILEC partner stagger along. Competition is thus slowed if not stymied, as the richly endowed ILEC CLEC elbows its would-be rivals aside.

Although the aforementioned LCI Petition examined the issue of ILEC affiliates in a different context, that of Section 271 provision of interLATA service, the record developed in response to that petition provides the best discussion of the possibility of reorganizing ILECs in the aftermath of the Act in a way that would benefit the public interest. While ICG doubts that the LCI plan, as set forth in its petition, would entirely suffice, it at the very least begins to establish the parameters of what might be acceptable. The LCI proposal sets forth a corporate structure for the RBOCs that would separate the retail and wholesale activities of the RBOC holding company into two separate subsidiaries: the retail company (called "ServeCo" by LCI) would have public ownership and independent management, while the wholesale company (termed "NetCo") would interact with the retail company on the same arm's length, non-discriminatory basis as any other retail service provider.

There apparently has been little willingness by the ILECs to engage in such a corporate structure discussion with regard to ILEC CLECs. In trumpeting its plans for ILEC CLEC BellSouth BSE, BellSouth appears to have focused only on satisfying its shareholders, rather than allaying potential concerns of its various regulators, customers, and competitors. It may be that the Commission will soon need to examine in a rulemaking context whether to mandate corporate restructuring arrangements. The more important concern at this juncture, however, is to stop the use of ILEC CLECs to halt all

but the most superficial form of local competition. To this end, the Commission should grant the relief sought by the CompTel petition without delay.

II. THE COMMISSION SHOULD GRANT THE RELIEF SOUGHT IN THE COMPTEL PETITION AND ADDRESS SPECIFIC DETAILS IN A RULEMAKING PROCEEDING

The CompTel Petition presents the Commission with an important opportunity to examine the varied issues surrounding the creation of ILEC CLECs. As indicated above, the relief sought by the CompTel Petition should be granted immediately, as the impact of the ILEC practices described in the Petition and in these comments are already being felt in the local competition marketplace. Issues tangential to the grant of such relief may require subsequent examination in a rulemaking context with the benefit of a thorough record. This in-depth examination should take place only *after* the Commission grants the requested relief.

More specifically, the Commission should issue a declaratory ruling, as requested by the CompTel Petition, that an ILEC affiliate that operates under the same or similar brand name and provides wireline local exchange or exchange access service within the ILEC's region will be considered a "successor or assign" of the ILEC under Section 251(h)(1)(B)(ii) of the Act, and consequently that the affiliate is subject to the obligations of ILECs under Section 251(c).

Although it should not delay the declaratory relief sought by the CompTel Petition nor be a substitute for it, another proposal set forth in the petition would also be a significant step toward addressing the concerns about ILEC CLECs. Under the alternative

approach, the Commission could propose a rule establishing a rebuttable presumption that an ILEC affiliate that provides wireline local exchange or exchange access service with the ILEC's service area under the same or similar brand name is a "comparable" carrier under Section 251(h)(2). Such an affiliate would thus be subject to the Section 251(c) interconnection obligations of ILECs. The criteria under which an in-region ILEC affiliate will be considered a "comparable carrier" under Section 251(h)(2) would be determined in the subsequent rulemaking. The initiation of a rulemaking, however, should not commence until the Commission first grants CompTel's request for a declaratory ruling.

It is understandable that existing carriers want to reorganize their operations in a way that will allow them to compete effectively in the post-Act telecommunications arena. Such changes are one of the benefits that the Act has helped foster. Nonetheless, the Act places substantial obligations, by necessity, on the incumbent carriers that have a well-established presence in the market. Local competition will become a reality only if these carriers meet their obligations. Once these obligations are met, there will be plenty of opportunity for the ILECs to restructure their operations and compete vigorously with the new CLEC entrants on the block. The CompTel Petition proposals would help to ensure that the ILECs are not in a position to win the competitive race *before* the other market entrants have made it to found the starting gate. Indeed, either the declaratory ruling or

the rulemaking would be fully consistent with the Commission's precedent, as the CompTel petition points out at length.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 1998, a copy of the foregoing Comments of ICG Telecom Group, Inc. was hand-delivered to the following:

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